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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA, )  
8 Respondent, ) NO. CR-04-0270-WFN-1  
9 -vs- ) CV-07-0074-WFN  
10 ROBERT V. ZORNES, )  
11 Movant. )  
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13 Pending before the Court is Mr. Zornes' *pro se* Motion to Vacate, Set Aside, or Correct  
14 Sentence under 28 U.S.C. § 2255 (Ct. Rec. 43). Assistant United States Attorney Earl Hicks  
15 represents the Government.

16 **I. BACKGROUND**

17 On February 5, 1993, Mr. Zornes pled guilty to Count 2 of the Indictment in Case No.  
18 CR-92-0260-WFN-1 pursuant to a plea agreement. The Court sentenced Mr. Zornes to  
19 41 months imprisonment and 4 years supervised release on June 23, 1993. Mr. Zornes filed  
20 an appeal which the Ninth Circuit dismissed on March 23, 1994. On July 12, 1993, Judge  
21 Justin Quackenbush issued a warrant for Mr. Zornes' failure to report for service of sentence.  
22 Once apprehended, the Government indicted Mr. Zornes for Failure to Appear for Service of  
23 Sentence on December 21, 2004, in Case No. CR-04-0270-WFN-1. The Court resentence  
24 Mr. Zornes in CR-92-260-WFN on December 22, 2004 and filed the Amended Judgment  
25 January 3, 2005. Mr. Zornes pled guilty to the Indictment in CR-04-0270-WFN-1 on  
26 February 4, 2005. On May 13, 2005, the Court sentenced Mr. Zornes to 8 months

1 imprisonment in CR-04-0270-WFN-1 to run consecutive to the underlying conviction in  
2 CR-92-0260-WFN-1 and three years supervised release to run concurrently with the  
3 supervised release imposed in CR-92-0260-WFN-1. Mr. Zornes was released on February 3,  
4 2006. Shortly thereafter, the Court issued a warrant for Mr. Zornes's arrest in response to  
5 allegations of violations of supervised release. During the supervised release violation  
6 hearing on December 6, 2006, Mr. Zornes admitted to the violations of failure to submit a  
7 monthly written report, failure to notify his probation officer at least ten days prior to change  
8 in residence, and leaving the judicial district without permission. The Court revoked Mr.  
9 Zornes, sentencing him to a term of imprisonment of 10 months and 26 months of supervised  
10 release in both CR-04-0270-WFN-1 and CR-92-0260-WFN-1 to run concurrently. On  
11 February 13, 2007, the Court filed an Amended Judgment in CR-92-0260-WFN-1 to correct  
12 a clerical error. The January 3, 2005 Amended Judgment listed the incorrect special  
13 assessment fee. The Court lowered the special assessment fee to reflect the correct amount,  
14 as listed in the original Judgment.

15 Mr. Zornes alleges three grounds for relief:

16 1. His counsel in CR-92-0270-WFN-1 was ineffective for failing to request a  
17 postponement prior of his plea of guilty to the violation of 21 U.S.C. § 841 during the  
18 December 22, 2004 hearing because he could not clearly remember the underlying facts and  
19 was forced to plead guilty and be sentenced in the same hearing;

20 2. The plea was not knowing and voluntary because he pled and was sentenced in the  
21 same hearing in Case Nos. CR-04-270-WFN-1 and CR-92-260-WFN; and

22 3. Supervised release after revocation in Case No. CR-92-0260-WFN-1 was illegally  
23 imposed.

## 24 II. DISCUSSION

25 The Court should hold an evidentiary hearing "unless the motion and the files  
26 and records of the case conclusively show that the prisoner is entitled to no relief." 28

1 U.S.C. § 2255. "To earn the right to a hearing, therefore, [Movant] [is] required to  
2 allege specific facts which, if true, would entitle him to relief." *Ortiz v. Stewart*, 149 F.3d  
3 923, 934 (9th Cir. 1998), quoting *United States v. McMullen*, 98 F.3d 1155, 1159 (9th  
4 Cir 1996). If an evidentiary hearing is not required, the Court "shall make such disposition  
5 of the motion as justice dictates." Rule 8, RULES GOVERNING SECTION 2255 PROCEEDINGS  
6 (West 2006).

7 To gain relief, Mr. Zornes must establish that (1) he is in custody under a sentence of  
8 this federal court; (2) his request for relief was timely; and (3) the court lacked either personal  
9 or subject matter jurisdiction, the conviction or sentence is unconstitutional, the conviction  
10 or sentence violates federal law, or the sentence or judgment is otherwise open to collateral  
11 attack. 28 U.S.C. § 2255.

12 Mr. Zornes failed to show his request for relief was timely for the first two grounds.  
13 A one year statute of limitation applies to § 2255 claims. The limitation period runs  
14 beginning on the date which the judgment of conviction becomes final. 28 U.S.C. § 2255.  
15 A conviction becomes final after imposition of sentence. *Id.* Where an appeal has been filed,  
16 the limitation's period does not begin to run until after the final amended judgment has been  
17 filed. *United States v. LaFramboise*, 427 F.3d 680, 683 (9th Cir. 2005). However, where an  
18 amended judgment merely corrects a clerical error, the limitation's period begins to run from  
19 the time that the original judgment was entered. *Clay v. United States*, 537 U.S. 522, 527-28  
20 (2003). Mr. Zornes filed the § 2255 Motion on March 8, 2007. In Case No.  
21 CR-04-0270-WFN-1, the limitation period ran out May 13, 2006, one year after judgment  
22 was imposed on May 13, 2005. In Case No. CR-92-0260-WFN-1, the limitation period  
23 ran out January 3, 2006, one year after the filing date of the Amended Judgment. Though the  
24 Court issued an Amended Judgment on February 13, 2007, this Amended Judgment does not  
25 affect the statute of limitation for the purposes of the § 2255 Motion, because the amendment  
26 was purely clerical.

1 Even if the statute of limitation began to run when the Amended Judgment was filed  
2 in CR-92-0260-WFN-1, Mr. Zornes's first two grounds do not state a claim. Mr. Zornes did  
3 not, as he claims, plead guilty and proceed to sentencing in the same hearing in Case No.  
4 CR-92-0260-WFN-1. Mr. Zornes pled guilty on February 5, 1993, was sentenced June 23,  
5 1993, then was resentenced on December 22, 2005. Though he may well have forgotten the  
6 underlying facts while on the lam, he pled guilty 12 years prior when his memory was fresh.  
7 Further, counsel had no responsibility to request time to examine discovery for the hearings  
8 held in 2004, because Mr. Zornes had already pled guilty to the offense.

9 The third ground, because it challenges his revocation, not the underlying sentence and  
10 conviction, is timely; however, it also lacks merit. Contrary to his assertions, both the 1993  
11 version of the United States Sentencing Guidelines and 18 U.S.C. § 3853(e)(3) (West 1993)  
12 permitted imposing an additional term of supervised release after imprisonment for  
13 revocation. Thus, the Court's imposition of an additional term of supervised release did not  
14 run afoul with the *ex post facto* clause of the Constitution.

15 For all the foregoing reasons, an evidentiary hearing is not required in this matter.  
16 Mr. Zornes's § 2255 Motion must be dismissed.

### 17 **III. CERTIFICATE OF APPEALABILITY**

18 An appeal of this Order may not be taken unless this Court or a circuit justice  
19 issues a certificate of appealability finding that "the applicant has made a substantial  
20 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2006).  
21 This requires a showing that "reasonable jurists would find the district Court's assess-  
22 ment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473,  
23 484 (2000). If a claim is dismissed on procedural grounds the Court must determine  
24 whether

25 jurist of reason would find it debatable wither the petition states a valid claim of  
26 the denial of a constitutional right and that jurists of reason would find it  
debatable whether the district court was correct in its procedural ruling.

1 *Slack*, 120 S. Ct. at 1604. A certificate of appealability should not be granted unless both  
2 components, one directed at the underlying constitutional claims, and the second directed at  
3 the court's procedural holding, are satisfied. *Id.* The Court may address either the  
4 constitutional or procedural issue first. *Id.* Based on the Court's preceding analysis, the Court  
5 concludes: (1) that Mr. Zornes has failed to make a substantial showing of a denial of a  
6 constitutional right and (2) that jurists of reason would not find it debatable whether the Court  
7 was correct in any procedural ruling. Thus a certificate of appealability should not issue.  
8 Accordingly,

9 **IT IS ORDERED** that Mr. Zornes's Motion Under § 2255, filed March 8, 2007,  
10 **Ct. Rec. 43**, is **DENIED WITH PREJUDICE**.

11 The District Court Executive is directed to:

- 12 • File this Order and provide copies to pro se Movant and counsel of record;  
13 • Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice of  
14 Appeal that a certificate of appealability is **DENIED**; and  
15 • **CLOSE** the corresponding civil file, **CV-07-0074-WFN**.

16 **DATED** this 18th day of April, 2007.

17  
18 s/ Wm. Fremming Nielsen  
19 04-18 WM. FREMMING NIELSEN  
20 SENIOR UNITED STATES DISTRICT JUDGE  
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